ACCESS TO INFORMATION & PROTECTION OF PRIVACY

RECORDS MANAGEMENT
By
TREATY & ABORIGINAL RIGHTS RESEARCHERS
& RESEARCH CENTRES

Overview of a Presentation
By
Peter Havlik

to the

National Claims Research Workshop
Winnipeg, Manitoba
October 14 - 16, 1999

A.T.I.P.P. for FIRST NATIONS

Over the years, the topic of access to information and protection of privacy (ATIPP) has been discussed many times by the Treaty & Aboriginal Rights Research (TARR) community. The problems and challenges facing claims researchers in obtaining government records are well known. The government has a myriad of policies which govern what information it will release and under which circumstances. What we have never discussed, however, are First Nation policies for handling the information once Treaty & Aboriginal Rights researchers obtain possession of it.

This is a critical question, because some of the information we gather is very sensitive. Under a special provision within the federal *Privacy Act*, claims researchers are granted an exception to the restrictions normally imposed by the government on the release of personal information pertaining to individuals. This places a special and unique responsibility on claims researchers and claims research centres to handle this information with particular care.

Examples of records which we may obtain under paragraph 8(2)k of the *Privacy Act* range from treaty annuity paylists to trapline records to residential school files to RCMP arrest records. These documents can be critical for successful claims preparation, but carry with them a responsibility to maintain their confidentiality.

The Department of Indian Affairs and Northern Development has taken the position that inappropriate release of such records may result in the suspension of future claims research privileges or "such further action" as it may deem necessary to prevent further breaches of privacy. First Nation researchers are also accountable to their client First Nations and their members to maintain the confidentiality of records obtained for claims research purposes.

The objective of this presentation is to stimulate discussion and to provide a forum for the exchange of ideas on best practices for First Nation ATIPP. Some topics for discussion will include:

- The need for circulation policies for records held by claims research centres.
- The need for circulation policies to be formally approved and ratified by client First Nations.
- How to handle requests from individual First Nation members for records pertaining to them or to their ancestors.
- Not accessing information under paragraph 8(2)k of the *Privacy Act* when there are alternatives.
- Information sharing practices between First Nations for claims purposes.
- The obligation of claims researchers to inform their client First Nations of the confidentiality of the records being retrieved for them.
- The need for claims researchers and research centres to maintain systems for tracking the sources (and resulting levels of confidentiality) of files being retrieved.

A SAMPLE FIRST NATION CIRCULATION POLICY

1. Researcher access to files originally obtained under federal or provincial access to information legislation remains subject to the controls provided for under that legislation. For access to such files, or to any other files considered confidential by the First Nations to which they pertain:

   a. A researcher must obtain a valid BCR from the First Nation whose records they are requesting. This BCR must clearly authorize the researcher to access the information being asked for.

   b. A researcher will be permitted to access only those confidential records pertaining to the First Nation from which they have a BCR. Access to other First Nations' confidential records will require separate BCRs from those First Nations.

   c. Individual researchers wishing to access records pertaining to themselves or to their linear ancestors may do so without a BCR. However, they may access records pertaining only to linear ancestors who have been deceased for a minimum of twenty years. Access to information on a family member who is living will be allowed only if the researcher obtains written permission from that person.

   d. [For access to records originally obtained under Paragraph 8(2)k of the federal *Privacy Act*, the researcher shall be required to sign an undertaking that the records will be used by them only for the purpose of "researching or validating the claims, disputes, or grievances of any of the aboriginal peoples of Canada."] - **Note: The position of the Government of Canada is that the researcher should be required to obtain such information directly from the government.**

2. Researchers shall have free access to records which are in the public domain (ie. available to the public elsewhere and without restriction).

3. Access to oral history interview transcripts or audiovisual recordings not already in the public domain shall be governed by the terms, if any, under which those transcripts or recordings were allowed to be made by the subject individuals. Where those wishes cannot be readily determined, the [TARR Archivist? TARR Director?] may require the researcher to obtain written authorization from the subject individual (or their descendants if they are deceased).

4. A decision of the TARR [Archivist? Librarian?] may be appealed to the TARR Director. If a satisfactory resolution cannot be reached, the TARR Director may refer the matter to the TARR [Board of Directors? A quorum of the member Chiefs?] for a final decision.

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Your file Votre référence

Our file Notre référence

May 6, 1999

Mr. Peter Havlik
Director
Treaty 8 Tribal Association
Treaty and Aboriginal Rights Research
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Peter

Dear Mr. Havlik:

Re: DIAND ATIP Policy - Paragraph 8(2)(k) of the federal *Privacy Act*

Thank you for your letter of March 19, 1999, seeking clarification of the views of the department regarding obligations of TARR centres in respect of information obtained from the department under paragraph 8(2)(k) of the *Privacy Act*.

I should say at the outset that while DIAND is pleased to provide you with clarification of the department's position, DIAND cannot provide you with legal advice. What is set out in this letter is not, and should not be relied upon, as legal advice. The following sets out the expectations of the department when it exercises its discretion to provide personal information under paragraph 8(2)(k).

Only federal government institutions are authorized under the *Privacy Act* to disclose personal information under 8(2)(k). DIAND exercises its discretion to permit Native Claims researchers and TARR centres access to such information on the basis that the personal information provided:

- shall continue to be protected; and
- shall not be used or disclosed by a Native Claims researcher or a TARR centre for any purpose other than the specific purpose for which the information was disclosed.

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Canada

The undertaking to which you refer in your letter is intended by the department to ensure that all Native Claims researchers and TARR centres are formally accountable for the protection of personal information which the department has disclosed to them pursuant to paragraph 8(2)(k). DIAND would consider it a breach of the undertaking if personal information thus provided were permitted to be used for any purpose other than the specific purpose for which it was provided. One example of such a breach would be the specific case you outline in your letter pertaining to Mr. Cleary's request to you. In such a case, a researcher wanting access to claims-related information held by the TARR centre, should be directed to DIAND to make the request for the information. Thus, the TARR centre respects its undertaking and the purpose and intent of paragraph 8(2)(k) of the Act, which is to make claims-related material available to First Nations for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada, can also be met.

In the event that the undertaking was breached, DIAND would take the necessary steps to protect personal information from improper use or disclosure. Such steps might include withdrawal of research privileges from a Native Claims researcher or a TARR centre found to be in breach of an undertaking, and such further action as DIAND considered appropriate to prevent further unauthorized use or disclosure of personal information.

Consequently, any disclosure under 8(2)(k) is made with the clear understanding that only the Native Claims researcher or TARR centre and the specific First Nation for whom the research is being conducted will have access to that information. No further disclosure of personal information is permissible.

In closing, you are aware that, in response to concerns raised by some Native Claims researchers, DIAND is presently reviewing its policy with respect to 8(2)(k) undertakings. The department anticipates that this review may result in a different or amended form of undertaking. However, the intent of the undertaking and DIAND's expectations, when it exercises its discretion to provide personal information under paragraph 8(2)(k), will remain unchanged.

I trust the foregoing has been of assistance in clarifying the department's position when exercising its discretion to provide personal information under 8(2)(k). Should you wish to distribute this response to your colleagues in the Native Claims research community, please do not hesitate to do so. I look forward to discussing this matter with you.

Yours sincerely,

Diane Leroux
Coordinator
Access to Information and Privacy

cc: Sheila Watkins
John Leslie
Kirk Douglas